United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-6116

To be argued by
STANLEY H. WALLENSTEIN

In The

United States Court of Appeals

For The Second Circuit

B

P/S

GASTON BRIONES and CECILIA BRIONES,

Appellants,

-against-

MAURICE F. KILEY, District Director for the New York District, Immigration and Naturalization Service, United States Department of Justice,

Appellee.

On Appeal from the United States District Court for the Southern District of New York.

BRIEF FOR APPELLANTS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-6116

GASTON BRIONES and CECILIA BRIONES,

Appellants,

-against-

MAURICE F. KILEY, District Director for the New York District, Immigration and Naturalization Service, United States Department of Justice,

Appellee.

BRIEF FOR APPELLANTS

Statement of the Issues

I

Whether the District Director, in denying the Brioneses' application for restoration of voluntary departure on the ground that they had failed to leave earlier when they had voluntary departure, abused his discretion by not taking into consideration the reasons underlying their two earlier failures to depart.

II

Whether the Brioneses' two earlier failures to leave under voluntary departure were explainable and at least facially justifiable.

III

Whether as a matter of law, the second grant of voluntary departure given by the Immigration Judge has ever expired.

Statement of the Case

This is an appeal from an order of the Honorable Charles H. Tenney, United States District Judge for the Southern District of New York, dated June 29, 1976, denying the appellants' motion for a preliminary injunction. Judge Tenney's memorandum decision is set forth in the appellants' appendix (A.3-11) [1/] and is not yet reported.

The appellants, Gaston and Cecilia Briones, both Chilean nationals, applied to the District Director for permission to leave the country voluntarily rather than by enforced deportation. They had been given voluntary departure two times earlier by an Immigration Judge, but had not left.

1/ References preceded by "A" refer to the pages of the appellants' appendix.

The District Director denied their application for the reason that they had failed to leave earlier under voluntary departure when they had the opportunity to do so.

In the District Court, the Brioneses contended that the earlier failures to leave under the voluntary departure grants were explainable and justifiable. They stayed beyond the first grant in order to prosecute a claim for political asylum. They stayed beyond the second grant in order to join in the Noel v. Chapman[2/] litigation then in progress before this Court. As both matters were substantial, and would have been forfeited had they left, the Brioneses argued that their failures to leave were justifiable and could not be used as a ground on which to deny relief.

The Government, without expressing an opinion on whether the political asylum grant or the Noel v. Chapman litigation were substantial matters, argued that the District Director's decision should be upheld because the Brioneses engaged in dilatory tactics to extend their stay in the United States. The District Judge, also without appraising the merits of the political asylum claim or the Noel v. Chapman litigation as reasons justifying the Brioneses' failure to leave earlier, agreed with the Government and affirmed the District Director by denying the motion for a preliminary injunction.

2/ Noel v. Green, 376 F.Supp. 1095 (S.D.N.Y.1974), aff'd, Noel v. Chapman, 508 F.2d 1023 (2d Cir.1975), cert. denied, 44 U.S.L.W. 3201 (1975)(referred to in this brief as the Noel v. Chapman litigation).

On this appeal, the Brioneses contend that the District Court erred because their political asylum claim and the Noel v. Chapman litigation were substantial matters, that they were justified in remaining beyond the grants of voluntary departure in order to pursue those matters, and that their earlier failures to depart, being at least facially justifiable, should not be used as a ground on which to now deny relief. Alternatively, the Brioneses contend that their second grant of voluntary departure given by the Immigration Judge has never expired as the District Director never set the time for them to depart voluntarily under that order.

Statement of the Facts

The facts, as they appear from the record before the District Court[3/] are not in dispute and are as follows:

Gaston and Cecilia Briones are both natives and citizens of Chile. They were admitted to the United States as temporary visitors in September 1969 and January 1970, respectively, and they overstayed their authorized visit (A.12-13). They married in March 1970 and they have lived here these past several years with their daughter, Paola, who was born in the United States on June 4, 1973 (A.26).

On February 26, 1971, the Brioneses appeared in the New York District Office of the Immigration and Naturalization Service (INS) and stated that they wished to apply for political asylum (A.13). One year later, on

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3/ The record before the District Court included the affidavit in support of the motion for a preliminary injunction (A.25-32), the Government affidavit in opposition (A.12-23) and exhibits to both affidavits.

February 28, 1972, the INS informed them that their application had been denied (A.13). On the same day, the INS commenced deportation proceedings against them (A.14).

The deportation hearing was held on May 3, 1972. The Brioneses conceded they were deportable as overstay visitors and requested voluntary departure in lieu of deportation. The Immigration Judge entered an order granting voluntary departure to September 3, 1972 with an alternate order of deportation to Spain. The Brioneses, fearful of returning to Chile, had designated Spain as the country of deportation, if such would become necessary (A.14).

During this time, Mrs. Briones had been working for a local import-export firm as a bi-lingual secretary. Before the time for voluntary departure expired, on or about September 1, 1972, the Brioneses requested an extension of voluntary departure to December 3, 1972. The request was based on her employer's need for her services during that time (A.14). The INS denied the request and ordered the Brioneses to leave by September 20th. They did not leave and the INS issued warrants of deportation on November 6, 1972 (A.15) but did not then move to enforce the order, apparently because Spain had declined to permit the Brioneses to enter (A.27).

During this time, Cecilia Briones' American employer submitted an application for a labor certification

on her behalf. The application, submitted pursuant to Section 212(a)(14) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1182, alleged that his business required a bi-lingual secretary, that no American workers were available and that Cecilia was qualified to perform the job. The Secretary of Labor, finding that no American workers were available, granted the Labor Certification with a priority date of October 10, 1972 (A.15).[4/] This meant that the Brioneses were now prima facie qualified for emigration to the United States as permanent residents, but faced a wait of about two-and-one-half years before their priority date would become current under the Western Hemisphere quota.[5/]

Also about this time, during September 1972, Cecilia Briones became pregnant with her first child. Because of a gall bladder ailment, she developed side effects so severe as to require hospitalization for two weeks during November 1972. On December 8, 1972, the Brioneses applied to the INS for a ninety-day stay of deportation because of Cecilia's physical condition (A.15). The INS responded by granting a stay but giving only about thirty days (A.15).

4/ The labor certification issued under Section 212(a)(14) of the Act, 8 U.S.C. § 1182(a)(14), certifies that American workers are in short supply and that employment of the alien will not adversely affect the American labor market.

5/ The Western Hemisphere is under a separate annual quota of 120,000 visas. Section 21(e) of the Act of October 3, 1975, P.L. 89-236, 79 Stat. 921. The quota is oversubscribed to the point where there is about a 2-1/2 year wait between the time an alien qualifies for a visa and the time he can be issued the visa.

The Brioneses' attorney then, on or about January 10, 1973, requested the INS to reconsider and grant the additional time originally requested (A.15).

The INS never responded to this last request and never moved to enforce the deportation order. Then on June 4, 1973, Cecilia Briones gave birth to her daughter, Paola, who is of course a United States citizen (A.15).

Three months passed with the INS still taking no action in the case.[6/] Then, on September 21, 1973, the Brioneses renewed their plea for political asylum by submitting to the INS a motion directed to the Immigration Judge to reopen the deportation proceeding to permit them to apply for withholding of deportation to Chile for fear of persecution (A.16).[7/] This was at about the time of the overthrow of the Allende Government in Chile and the creation of the Military Junta.

The District Director considered the asylum claim administratively before forwarding it to the Immigration Judge.[8/] He furnished the facts in the case to the Department of State for an advisory opinion. On March 21, 1974, the Department of State advised against granting the claim. A

6/ We do not know why the INS did not move to enforce deportation. It may have been out of deference to Cecilia's physical condition or it may have been due to a general reluctance to enforce deportation to Chile which was then undergoing an insurrection.

7/ Motions to reopen deportation proceedings based on new evidence are permitted under 8 CFR § 242.22. The application for withholding of deportation because of anticipated persecution is permitted under Section 243(h) of the Act, 8 U.S.C. § 1253(h).

8/ As required by 8 CFR §§ 108.1 and 108.2.

month later, on April 24, 1974, the District Director informed the Brioneses that he had denied their claim for political asylum, that he was referring their motion to reopen the deportation proceedings to the Immigration Judge,[9/] and that deportation would not be stayed (A.16).

The Immigration Judge, following the advice of the State Department declined to reopen the deportation proceeding but in his decision of May 6, 1974, granted the Brioneses voluntary departure to May 20, 1974 (A.16). Thus, the Brioneses now had their second grant of voluntary departure.

During this time the appeal in the Noel v. Chapman litigation was pending before this Court. That litigation raised constitutional issues as to whether aliens similarly situated to the Briones should be permitted to remain in the United States in a voluntary departure status until their immigrant visa applications become current. The case had been started as a class action in the Southern District of New York on August 24, 1973, under the caption Noel v. Green. It was decided by the District Court on February 6, 1974, in an opinion denying the motion for a preliminary injunction. 376 F.Supp. 1095 (S.D.N.Y. 1974). It was then taken on appeal to this Court and the appeal was pending while the Brioneses had their second grant of voluntary departure, which, under the Immigration Judge's order, ran from May 6 to May 20, 1974.

9/ The denial of a claim for political asylum by a District Director does not preclude an alien from applying for withholding of deportation before the Immigration Judge. 8 CFR § 108.2.

Under the INS regulation, 8 CFR § 244.2, the time for voluntary departure given by an Immigration Judge can be extended by the District Director. As permitted by the regulation, the Brioneses' attorney, on May 14, 1974, applied to the District Director for an extension of the voluntary departure time until their visa priority date would become current (A.17,24). This was the same relief that the plaintiffs in Noel v. Chapman were seeking and was a necessary step by way of exhaustion of administrative remedies, to permit the Brioneses to join the Noel v. Chapman litigation if their application was to be denied.

The application was denied by the District Director (A.17), but the date and manner of the denial is unclear from the record submitted by the Government (A.17). The Government simply states it was denied and that by notice dated June 18, 1974, the Brioneses were directed to surrender for deportation on July 8, 1974 (A.17). This was the first time the INS had moved to enforce the order of deportation.

On that date, July 8, 1974, the Brioneses' attorney filed a declaratory judgement action in the Southern District of New York raising the same issues as in Noel v. Chapman.[10/] A few days after the action was filed, it was dismissed by stipulation between the Brioneses' attorney and the United States Attorney. The stipulation stated that the facts and issues were similar to those involved in Noel v. Chapman, that the

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10/ The action was entitled Noriega, et al. v. Kiley, 74 Civ. 2916.

matter would be governed by the final decision in Noel, and that deportation would be stayed pending final determination of the case (A.33). This selfsame procedure had been followed in cases filed by hundreds of aliens whose situations were similar to the aliens in Noel v. Chapman.[11/]

The appeal in Noel v. Chapman was handled by the American Civil Liberties Union, and the District Court's decision was affirmed by this Court on January 3, 1975. 508 F.2nd 1023 (2nd Cir. 1975). The plaintiffs in Noel then petitioned the Supreme Court for certiorari. During this time the INS stayed any action on the Brioneses and on all other aliens similarly situated who had filed complaints in the District Court and who had been stipulated into the Noel case.

While the petition for certiorari in Noel v. Chapman was pending, the Brioneses' visa priority date became current and they were invited by the United States Consulate in Chile to appear and formally apply for their immigrant visas. This meant, of course, that the issues in the Noel v. Chapman litigation were now moot as to the Brioneses. Thus, the Brioneses on April 7, 1975 moved the INS to release them from the litigation and permit them to leave the United States voluntarily (A 18).

11/ Although styled as a class action, Noel v. Chapman was never designated as being such. The INS, however, considered all similarly situated aliens as being bound by the Noel litigation provided the aliens filed independent complaints in the District Court.

The District Director declined to permit them to leave voluntarily and referred the motion to the Immigration Judge (A.18). The Immigration Judge also declined to restore voluntary departure, and the Board of Immigration Appeals affirmed (A.19). Thus the Brioneses were left with no choice but to remain and await the outcome of the Noel v. Chapman case.

The Noel v. Chapman litigation finally ended when the Supreme Court denied certiorari on October 6, 1975. 44 U.S.L.W. 3201. The INS then, by notice dated January 28, 1976, ordered the Brioneses to report for deportation to Chile on February 10, 1976 (A.19).

After receiving the notice, the Brioneses, on February 4, 1976 made the application, the denial of which is the subject of this action. They applied to the District Director for a stay of deportation and for restoration of voluntary departure (A.28).[12/] The reason set forth for requesting a stay of deportation was that Gaston Briones owned a restaurant and required thirty days in which to arrange for its sale. The reasons set forth for requesting restoration of voluntary departure were: (1) that they have a United States citizen child, (2) that they have a current immigration visa priority date, and (3) that they did not leave under the prior voluntary departure grant because only by remaining here could they join in the Noel v. Chapman litigation then in progress (A.29,34).

12/ The application for a stay of deportation is permitted under 8 CFR § 243.4. The application for restoration of voluntary departure is permitted under 8 CFR § 244.2.

The District Director summarily disposed of the application by his letter of February 12, 1976 containing his decision (A.35). He granted that part of the application requesting a stay of deportation by deferring deportation to March 10, 1976. He denied that portion of the application requesting restoration of voluntary departure. The reason set forth in support of the denial was that the Brioneses had failed to leave voluntarily when they had that opportunity in the past (A.35).

This litigation, seeking review of the District Director's denial of the application to restore voluntary departure, followed. As noted earlier, the District Court concluded that the District Director had not abused his discretion (A.9,11). Thus, although this appeal is from an order denying a preliminary injunction, as the Court below finally determined the underlying legal issue, this case is now ripe for plenary appellate review.[13/]

13/ See Noel v. Chapman, supra, 508 F.2d at 1025, and authorities cited therein.

Relevant Statute

Section 244(e) of the Act, 8 U.S.C. § 1254(e):

"The Attorney General may, in his discretion, permit any alien under deportation proceedings,... to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection."

Relevant Regulation

Title 8, Code of Federal Regulations [CFR]:

"§244.2. Extension of time to depart. Authority to extend the time within which to depart voluntarily specified initially by a special inquiry officer or the Board is within the sole jurisdiction of the district director. A request by an alien for an extension of time within which to depart voluntarily shall be filed with the district director having jurisdiction over the alien's place of residence. Written notice of the district director's decision shall be served upon the alien and no appeal may be taken therefrom."

ARGUMENT

Point I

THE DISTRICT DIRECTOR ABUSED HIS DISCRETION BY DECLINING TO RESTORE VOLUNTARY DEPARTURE FOR THE REASON SET FORTH, AS HE FAILED TO TAKE INTO CONSIDERATION THE REASONS UNDERLYING THE EARLIER FAILURES TO DEPART.

a. The nature and importance of voluntary departure.

The authority to grant voluntary departure derives from Section 244(e) of the Act, 8 U.S.C. § 1254(e). The statute permits voluntary departure to be given as a matter of discretion to an otherwise deportable alien who can establish that he has been of good moral character for at least five years. Voluntary departure is the minimal form of discretionary relief available under our immigration laws as it provides no other bounty except to permit the alien to avoid a stigma of deportation.[14/] To the great number of deportable aliens who have no prospect of returning lawfully to this country, voluntary departure is of no great importance. It is of great importance, however, to those deportable aliens who do have a prospect of returning lawfully to this country because the alternative, enforced deportation, is an in-

14/ Most other forms of discretionary relief result in the granting of permanent residence or its equivalent, see Sections 243(h), 244(a), 245 and 249 of the Act, 8 U.S.C. §§ 1253(h), 1254(a), 1255 and 1259.

dependent ground of exclusion. The Brioneses are in this latter class, and in fact, have already qualified prima facie under our laws for return to this country as lawful permanent residents. Thus, whether they leave under voluntary departure, as they have been trying to do for the past year-and-a-half, or by enforced deportation is of critical importance to them, and of course, to their infant daughter.[15/]

The relief of voluntary departure is normally granted initially by an Immigration Judge at a deportation hearing whose order provides, as it did in this case, that the time given may be extended by the District Director. 8 CFR § 244.1. The District Director is given specific authority under 8 CFR § 244.2, to extend the time for voluntary departure initially granted by the Immigration Judge. The regulation is quite properly interpreted by the INS as including not only the authority to extend the time for voluntary departure, but also the authority to reinstate voluntary departure where the time initially granted has expired and the alien has not left the country. See Matter of Yeung, 13 I&N Dec. 528 (1970).

15/ Under Section 212(a)(17), 8 U.S.C. 1182(a)(17), aliens who have been deported are thereafter excludable unless they obtain special consent from the Attorney General to apply for admission. The District Director has authority to grant such consent in advance of an alien's deportation and conditioned upon an alien's departure, 8 CFR § 212.2(i). The Brioneses had applied for such consent some time ago, but the District Director refused even to accept their application. Had it been accepted and granted, this case would have, of course, now been moot.

Whether it be an initial request for voluntary departure, or a request for an extension or restoration, the ultimate determination is discretionary with the appropriate administrative officer. Thus an alien, even though he is statutorily qualified, has no absolute right to be granted voluntary departure. He does, however, have a right to submit his application, have it considered on its own merits, and has a right to a discretionary determination. See generally, Gordon and Rosenfield, Immigration Law and Procedure, ¶ 8.15(1975).

b. The Scope of Review

The scope of judicial review of a denial of voluntary departure, like all review of discretionary action, is a narrow one. The ultimate decision depends on the facts particular to the case, Fernandez-Gonzalez v. Immigration and Naturalization Service, 347 F.2nd 737 (7th Cir.1965), and an adverse discretionary determination will not be overturned unless there is a clear showing of abuse of discretion. Manantan v. INS, 425 F.2nd 693 (7th Cir. 1970). The test often applied in this circuit for abuse of discretion is whether the decision was "...made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis...." Wong Wing Hang v. INS, 360 F.2nd 715,719 (2nd Cir.1966). And the Supreme Court has

declared that the authorization under the Administrative Procedure Act to set aside agency action which is "arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law,"[16/] requires consideration "whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgement," and may regard the agency action as arbitrary and capricious even if it is supported by substantial evidence.[17/]

Thus, while discretion is reviewed within narrow confines, this does not mean that courts are required to "rubber stamp" such administrative action. See Rassano v. INS, 492 F.2nd 220 (7th Cir. 1974). As a general rule, courts will not substitute their discretion for that of the responsible administrative officer, and a discretionary determination will not be disturbed where it is clear that discretion has been exercised and the reasons for the denial are sound. Lam Tat Sin v. Esperdy, 334 F. 2nd 999 (2nd Cir. 1964), cert. denied, 379 U.S. 901. The courts, however, will examine the decision to see if it rests on a reasonable foundation and that the relevant factors were considered, and will correct an abuse of discretion or compel the exercise

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16/ 5 U.S.C. § 706

17/ Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402,416 (1971); Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281 (1974)

of discretion where the officer has failed to do so.[18] And the Court's scrutiny should be particularly close where the denial of relief results in grave consequences as it does in this case. Fong Haw Tan v. Phelan, 333 U.S. 6,10(1948).

The Court's function then is to examine the basis for the decision and the rationale supporting it. If it appears that the District Director weighed legitimate factors, his decision must stand. Cf. East Oakland-Fruitdale Planning Council v. Rumsfield, 471 F.2d 524,534 (9th Cir. 1972). Conversely, if important and legitimate factors exist which he failed to consider, or failed to give appropriate weight to, his decision should be set aside as an abuse of, or failure to exercise discretion.[19]

In this case, even within the narrow scope of review, there is no doubt that an abuse of discretion occurred. As we will show, the reasons underlying the

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18/ See Alcaaino-Baez v. Sureck, —F. 2nd— (9th Cir. Aug. 3, 1976) (Dkt. No. 75— 1986) (denial of stay of deportation, remanded); Giambanco v. INS, 531 F.2nd 141 (3rd Cir. 1976) (discretionary denial of status adjustment, reversed and remanded); Asimakopoulos v. INS, 445 F.2nd 1362 (9th Cir. 1971) (denial of suspension of deportation, reversed); United States ex rel. Exarchou v. Murff, 265 F.2nd 504 (2nd Cir. 1959) (denial of new grant of voluntary departure, reversed); Mastrapasqua v. Shaughnessy, 180 F. 2nd 999 (2nd Cir. 1950) (denial of suspension of deportation, reversed).

19/ While some discretionary immigration decisions can be upheld simply if the reason given for the denial is "facially legitimate," see Kleindienst v. Mandel, 408 U.S. 753 (1972), MacDonald v. Kleindienst, (S.D.N.Y. 72 Civ. 1228, Tenney, J., 1974), this narrow scope of review which precludes consideration of factors underlying the decision has never been thought to apply to cases such as the instant one.

earlier failures to leave were factors relevant to the exercise of discretion, that those factors were not taken into consideration by the District Director, and that the District Court, in affirming the administrative decision, did not review the exercise of the discretion but simply applied a rubber stamp.

c. The reasons underlying the earlier failures to depart are factors relevant to the exercise of discretion.

The fact that an alien has failed to depart voluntarily in the past is, in itself, not a valid ground on which to deny restoration of voluntary departure. If it were, then notwithstanding the authorization in 8 CFR § 244.2 to grant restoration, all such applications "would be futile as foredoomed to failure",[20/] and restoration could be denied even though the prior failure to leave may have been justified. Thus, we suggest that the rule must be that failure to depart voluntarily in the past is a valid ground for denial of restoration only where the prior failure is unjustified. Conversely, where the prior failure to leave is justified, restoration cannot be denied solely on the ground of such failure.

20/ Alcaaino-Baez v. Sureck, supra.

This view is supported not only by logic but by the INS's own assessment of considerations which should be taken into account when determining whether to reinstate voluntary departure. In Matter of M-, 4 I&N Dec. 626,628 (1952), the Board of Immigration Appeals, in considering reinstatement of voluntary departure generally in the case of a crewman, observed that it should not be granted "unless he gives good and sufficient reasons why he did not or could not depart when granted that opportunity." More recently, in Matter of Onyedibia, Int. Dec. # 2307(BIA 1974), the Board held that in order to warrant a new grant of voluntary departure, an alien must demonstrate the existence of compelling reasons or circumstances for his failure to depart within the time originally allotted.

The rule we have suggested is also well supported by judicial precedent. In Fan Wan Keung v. INS, 434, F.2nd 301 (2nd Cir. 1970), several Chinese crewmen who had been granted voluntary departure but had not left, sought to have voluntary departure restored. Their reason for not having left earlier was that the District Director for years had followed a lenient policy in reinstating voluntary departure in similar cases, and they had relied on that policy. This Circuit, citing extensively from Matter of M-, affirmed the denials of restoration, holding that the aliens were not justified in remaining beyond the initial grant and that they had no right to rely on the earlier policy of liberality. 434 F.2nd at 306.

Similarly in Lam Chuen Ching v. INS, 467 F.2nd 644 (3rd Cir. 1972), the alien crewman had been granted voluntary departure in 1967. He failed to depart but managed to extend his stay for five years by what the Court characterized as "delaying tactics." 467 F.2nd at 645. His only argument was that his four-year stay in this country should be considered a factor in his favor. The Court affirmed the INS' refusal to reinstate voluntary departure, noting that "there is not even an attempt to excuse appellant for not leaving this country in 1967." 467 F.2nd at 645 21/

It is apparent then that under both judicial and administrative precedent, an earlier failure to depart under voluntary departure is not necessarily in itself a valid ground for denial of restoration. If no good explanation is given for the earlier failure to leave, then certainly restoration can be denied. On the other hand, where reasons are given in explanation for the overstay, those reasons should be assessed by the District Director before making his determination. Where the reasons for not having left are good and sufficient, the failure to leave in itself is not a sound predicate on which to deny reinstatement. 22/

21/ Along the same line see Chan Yiu Fai v. INS, 467 F.2nd 907 (3rd Cir. 1972). There are no decisions we know of which stand for the proposition that an earlier justified failure to depart can be used as a ground to deny restoration.

22/ The rule would be otherwise if the number of times an alien could be given voluntary departure were limited by statute or regulation, thereby depriving the District Director of discretion. There is, however, no such limitation, thus discretion under 8 CFR § 244.2 must be exercised. A bill to limit the granting of voluntary departure to one time, and to bar extensions, has been introduced in Congress, S. 3571, June 16, 1976, but not at least yet, enacted into law.

In this case, the written decision of the District Director says only that "your request for restoration of voluntary departure has been denied as you did not avail yourselves of that privilege when it was previously granted." Thus, it is clear enough that the District Director took into consideration the Brioneses' earlier failures to depart. But it is not clear that he assessed the reasons underlying the failures to depart. As we have shown, those reasons are factors relevant to the exercise of discretion. We now turn to discuss those reasons.

d. The earlier failures to depart were explainable and at least facially justifiable.

There were two reasons why the Brioneses overstayed their voluntary departure grants. One reason, which impelled them to stay past their initial voluntary departure time was to present their administrative claim for political asylum. The second reason, which impelled them to remain past the second grant of voluntary departure, was to join in the Noel v. Chapman litigation. We suggest that if either of these two matters can be dismissed as nothing more than frivolous, dilatory tactics, then the failures to depart would be unjustified. Conversely, if they involved substantial issues which the Brioneses were justified in raising, it would follow that their failures to depart were justifed.

1. The political asylum claim

The political asylum claim is per-

mitted under 8 CFR §§108.1 and 2.[23/] Under the INS procedure the claim is submitted to the District Director who determines whether it should be granted or denied. A claim which is denied can be renewed in a deportation proceeding before an Immigration Judge under Section 243(h) of the Act, 8 U.S.C. § 1253(h), which provides for withholding of deportation because of anticipated persecution.

It may well be true that any alien in this country whose time is running short can apply for asylum under the regulation and thereby extend his time in the country even though his claim is totally lacking in merit. But it hardly follows that every claim for political asylum is dilatory. In this case there are ample reasons showing that the Brioneses' claim for political asylum, even though it was ultimately denied, was substantial.

The Brioneses are native Chileans who came here the end of 1969 and beginning of 1970. It is a matter of common knowledge that tumultuous events occurred in Chile some time after the Brioneses left, culminating in the overthrow of the Allende government in September 1973 and the formation of a repressive military junta. Considering the events in Chile at that time, and the uncertainty as to which route the government would take, it is understandable that the Brioneses,

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23/ The regulations became effective December 3, 1974. Previous to that they were embodied in substantially the same form in the INS's Operation Instructions.

like many Chileans in this country, would be fearful then of returning to Chile.[24/] This, in itself, we think gives considerable substance to the Brioneses' claim for political asylum and at least justifies their remaining here until their claim was adjudicated.

In our view, any claim for political asylum by a Chilean at that time cannot be considered frivolous.[25/] Moreover, it is apparent that even the INS at the time it was submitted did not consider the Brioneses' claim to be frivolous. Under 8 CFR § 108.2., the District Director, before making his decision, is authorized to request the views of the Department of State. He may forego that step if the application is "clearly lacking in substance." In this case, the District Director did not forego that step but sought the views of the Department of State, and acted solely on the basis of the Department's letter. And the Brioneses' application, submitted in September of 1973, took seven months to adjudicate.

Certainly, if the Brioneses' claim for political asylum was nothing more than a dilatory delaying tactic, the INS could have disposed of it considerably earlier.

24/ See for example Cisternas-Estay v. Immigration and Naturalization Service, 531 F.2nd 155,157 (3rd Cir. 1976), in which a similar political asylum claim was made by native Chileans in 1971. The claim was denied by the INS after two-and-one-half years and there is no suggestion in the decision that it was considered frivolous.

25/ At least one member of Congress probably agrees. See H. R. 14127 introduced June 1, 1976 by Rep. Ottinger which would permit the entry and status adjustment of Chilean nationals who would be in danger of persecution if returned to Chile.

But even more importantly, the record contains evidence leading to the definite conclusion that the political asylum claim was put forth in good faith. The record shows that the Brioneses first put forth their claim to political asylum in February of 1971 when they voluntarily appeared at the INS office (A.13). At that time, they were under no compulsion to appear and, of course, not under orders of deportation.[26/] Thus, there can be no doubt but that the political asylum claim, far from being a dilatory delaying tactic, was a claim put forth in good faith with reasonable expectation of success.

The political asylum claim first put forth in 1971 and denied in 1972, was renewed in September 1973, after the first grant of voluntary departure expired. It is equally certain, however, that the renewal of the political asylum claim was made in good faith. Conditions in Chile had changed dramatically since the INS decision in February of 1972, with the Allende government now deposed and replaced by the military junta. See Cisternas-Estay v. INS, supra, 531 F.2nd at 157. Thus, the factors underlying the initial denial may no longer have been valid in view of the changed political situation. Moreover, when the Brioneses renewed their claim in September of 1973, there was then no INS action to delay. Although warrants of deportation had been issued, the INS had never moved to enforce deportation.

26/ It was this appearance, which of course triggered the deportation proceeding a year later.

The Government may argue that the Brioneses could have submitted their claim for political asylum in May of 1972 at the deportation hearing. This may be true, but in this regard it is interesting to note that the Brioneses selected Spain as the country of deportation with Chile being named as the alternate country. With no reason to believe that Spain would not accept them at that time the likelihood of enforced return to Chile seemed remote. In fact, the possibility of enforced return to Chile did not arise until about the time the Brioneses renewed their asylum request.

These factors, we think, tend at the least to show that the claim to political asylum was in no sense a frivolous, delaying tactic. Their claim may have been ultimately rejected but the burden of proof on an alien seeking political asylum is extremely high.[27/] The fact that they did not meet this burden does not make their claim frivolous.[28/]

27/ See Cheng Kai Fu v. INS, 386 F.2nd 750(2nd Cir. 1967), cert. denied, 390 U.S. 1003, in which the Court observed that the alien has the burden of presenting evidence showing "a clear probability of persecution."

28/ As indicated earlier, the renewed claim for political asylum was denied by the District Director and the Immigration Judge solely on the basis of a letter expressing the view of the Department of State. Those decisions cannot be judicially reviewed now. It is interesting to note, however, that this Court has recently stated that where there is a likelihood that such a State Department communication influenced the INS decision, it would be reversed. See Zamora v. INS, 534 F.2nd 1055, 1963 (2nd Cir. 1976).

The conclusion must follow that the Brioneses' claim was a substantial one which they had a right to make under our immigration laws. This being so, their failure to leave under the first grant of voluntary departure should not be a ground on which to deny reinstatement.

2. The Noel v. Chapman litigation

The Brioneses were given voluntary departure a second time in May of 1974 by the Immigration Judge when he rejected their motion to reopen the deportation proceeding to apply for relief under Section 243(h) of the Act, 8 U.S.C. § 1253(h). Again the time expired and they did not leave. Instead they filed a complaint in the District Court, joining in the Noel v. Chapman litigation which was already in progress for almost a year. Whether or not they were justified in overstaying voluntary departure we think turns on whether the Noel v. Chapman litigation itself was substantial and whether the Brioneses were properly in the class of aliens covered by that litigation. In our view, there can be no doubt but that the Noel v. Chapman litigation was substantial and that the Brioneses were properly in that class.

The appropriate starting point to assess the merits of the Noel v. Chapman litigation is, of course, the decisions of the District Court and of this Court. A simple

reading of those decisions[29] shows that difficult and substantial issues of equal protection were raised concerning the right of the plaintiffs to remain in the United States. It is true that those issues were eventually resolved against the plaintiffs. That, however, is hardly sufficient to classify the action as frivolous.

Moreover, we note that the manner in which the Government prosecuted the Noel v. Chapman litigation shows that the Government never considered that litigation to be frivolous. Although the litigation included hundreds of deportable aliens, the Government stayed action on all of them until the entire appellate process was exhausted.[30] And of course the stipulation entered into between the Brioneses' counsel and the United States Attorney (A.33) leaves no doubt that they were properly in the class covered by the Noel v. Chapman litigation.

In order to be involved in the Noel v. Chapman litigation, the Brioneses had to overstay their second grant of voluntary departure. As we have shown, there is no doubt but that that litigation was substantial and that the Brioneses were legitimately and properly involved in it. We think this mandates the conclusion that the Brioneses were justified in remaining beyond the grant of voluntary departure.

29/ Noel v. Green, 376 F.Supp. 1095 (S.D.N.Y. 1974), aff'd., Noel v. Chapman, 508 F.2nd 1023 (2nd Cir. 1975).

30/ Action was stayed until the Supreme Court denied certiorari October 6, 1975, 44 U.S.L.W. 3201.

The Brioneses thus stayed beyond their time for voluntary departure in order to present a political asylum claim and to litigate constitutional issues going to their right to remain here. Had they left under either grant of voluntary departure, they would have had to forego those claims. They had a right to make both claims and both claims were substantial. This being so, the conclusion must follow that their failures to leave were justified. Inasmuch as their failures to leave were justified, under the INS's own criterion, and under the judicial precedents we have cited, such failures should not be used as a ground on which to deny reinstatement.

e. The District Director failed to consider the reasons underlying the earlier failures to depart.

As we have shown, the reasons underlying an earlier failure to depart are relevant factors when considering a new grant of voluntary departure. We have shown too that the reasons underlying the Brioneses' two earlier failures to depart are at least facially justifiable. A review of the record leaves no doubt but that the District Director failed to consider these reasons in reaching his decision.

The written decision of the District Director says only that "your request for restoration of voluntary

departure has been denied as you did not avail yourselves of that privilege when it was previously granted"(A.35). Thus, it is clear enough that the decision on its face does not show any assessment or consideration of the reasons for the Brioneses not having left under the earlier voluntary departure grants. Certainly these reasons were before him in his administrative record. In our view, his decision, in order to have been legally sufficient, should have contained a finding as to whether the earlier failures to depart were justified or otherwise. In the absence of such a finding, it is impossible to tell whether he considered the political asylum claim and the Noel v. Chapman litigation as frivolous, dilatory tactics, or whether he considered them substantial, but denied relief notwithstanding. If the former were the case, his decision must fall because he did not set forth any reason why those matters were frivolous or dilatory. If the latter were to be the case, then his decision must fall as he mistakenly believed the law to permit a denial of voluntary departure even though the earlier failures to depart were justified.

Arguably, the defect in the District Director's decision might have been cured by his representative before the District Court.[31/] However, here too the Government comes up lacking. The record submitted by the Government in the

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31/ Although the reasonableness of an agency's decision cannot be a matter of second-guesswork, or be left to the post hoc rationalizations of the agency. Hawaiian Telephone Co. v. F.C.C., 409 F.2nd 771, (D.C. Cir. 1974).

District Court consists of the affidavit of the Special Assistant United States Attorney (A.12-23), and the exhibits thereto.[32/] The affidavit recites the Brioneses' history in this country (A.12-20), discusses the scope of review (A.20, 21), and concludes generally that the Brioneses engaged in dilatory tactics (A.22). But the Government never met the real issue in the case. There is not one word in the affidavit assessing one way or the other the substantiality of the political asylum claim of the Noel v. Chapman litigation. And for this we suggest there is good reason. The justifications we have put forth in Part d, supra, simply cannot be disputed by the Government.

It may not be true that in every case the District Director must justify his decision in a detailed manner. In many cases such as in Fan Wan Keung and in Lam Cheun Ching, both supra, where the dilatory tactics are self-evident and where no justification for not having left under a prior grant of voluntary departure is offered, a cursory decision simply stating the ground may be sufficient. But this case is distinguishable. Here plausible reasons, and at least facially justifiable reasons have been given for the Brioneses' failures to leave earlier, and all of these reasons appear in the record. In such a case we think

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32/ The Government submitted only the affidavit and no memorandum of law. The Brioneses' contentions were set forth in the affidavit and a memorandum of law and a supplementary memorandum.

that for a denial of relief to be made on the ground given, the District Director must assess those reasons and find that they are not justifiable. Here, however, it is apparent from his decision and from the record before the District Court that the District Director never assessed or considered those reasons, or if he did, he failed to given them appropriate weight. This leads to the conclusion that the District Director, in reaching his decision, either abused or failed to exercise his discretion.

Point II

THE BRIONESES ARE STILL UNDER VOLUNTARY DEPARTURE AS THE SECOND GRANT OF VOLUNTARY DEPARTURE HAS NEVER EXPIRED BECAUSE THE DISTRICT DIRECTOR NEVER SET THE TIME TO DEPART UNDER THAT ORDER.

Under INS regulations, an Immigration Judge has authority to grant voluntary departure at a deportation hearing and to specify the time within which to depart. 8 CFR § 244.1. His authority to specify the time, however, is limited to the grant of voluntary departure at the initial deportation proceeding. Id. An Immigration Judge has authority to reinstate voluntary departure, but when doing so he cannot specify the time. The authority to set the time to depart after restoration by an Immigration Judge is within the sole jurisdiction of the District Director. See Matter of Yeung, 13 I&N Dec. 528 (1970).

The record provided by the Government in the Court below shows that the Immigration Judge, when he denied reopening in his decision of May 6, 1974, reinstated voluntary departure to run from May 6, 1974 to May 20, 1974. His specific order was that "the outstanding order of deportation would be deemed lifted upon their departure from the United States on or before May 20, 1974" (A.16). A similar order phrased in the identical negative form had

been entered by an Immigration Judge in Matter of Yeung, supra, 13 I&N Dec. at 530. There the Board of Immigration Appeals held that the Immigration Judge had authority to grant voluntary departure anew, but erred in fixing the departure time. 13 I&N Dec. at 532,533. Thus, the Board interpreted the Immigration Judge's order as being simply a new grant of voluntary departure with the time to depart required to be fixed by the District Director. 13 I&N Dec. at 534.

It follows then that under the INS' interpretation of its own law, the Immigration Judge's order of May 6, 1974 in this case must be interpreted only as a new grant of voluntary departure. That portion of his order which set the time to depart was beyond his jurisdiction and must be considered as surplusage. As a result of his order, the Brioneses had voluntary departure, and it was encumbent upon the District Director to then set the time to depart voluntarily under that order. The record, however, shows that the District Director never did set the time to depart voluntarily. All that the record shows is that eight days after the entry of the Immigration Judge's order, an application for an extension was submitted (A.17,24). The record then shows that the application was denied on an unspecified date, and that on June 18, 1974, notices were sent to the Brioneses to surrender for deportation (A.17).

The record thus establishes that the Brioneses were given voluntary departure by the Immigration Judge but were never given an opportunity to depart under that order by the District Director. All that the District Director did after the entry of the Immigration Judge's order, was deny an application for an extension of time, which was in fact a nullity because the time had never been effectively set, and then order the Brioneses to report for deportation. Under 8 CFR 244.1, however, and under the holding in Matter of Yeung, supra, the District Director was required to set the time for the Brioneses to depart voluntarily. Inasmuch as he has never done this, the Immigration Judge's order of May 6, 1974 restoring voluntary departure must be considered as still in effect. The Brioneses, therefore, as a matter of law, are still under a grant of voluntary departure, with the time in which to depart voluntarily, yet to be set by the District Director.

The Government may argue that the Immigration Judge's order of May 6, 1974, should be given literal effect and considered as having set the time for voluntary departure as May 20. This of course would be directly contrary to the holding in Matter of Yeung. But even under this interpretation, the result would be the same, with the Brioneses still being under a grant of voluntary departure.

If the Immigration Judge's order is considered as setting the time as May 20th, the District Director

still had authority to extend the time under 8 CFR § 244.2. On May 14, 1974, midway during the period, the Brioneses applied for an extension as permitted by 8 CFR § 244.2 (A.24). The letter application was endorsed by the INS on May 15, 1974, stating that the Brioneses' attorney was advised of the status of the case but not showing a disposition of the request (A.24). And the affidavit below states only that the application was denied without saying when, and that the Brioneses were then on June 18, 1974, ordered to report for deportation (A.17).

The record thus does not show when the District Director adjudicated the Brioneses' extension application. For all that can be told, he may well have adjudicated it after the time granted by the Immigration Judge had expired. If such were the case, under judicial precedent, he was required to give them some time to depart voluntarily before seeking to enforce their deportation.

It is well settled now as a matter of law that voluntary departure is not forfeited by administrative or judicial review. See Gabanit v. INS, — F. 2nd — (Petition No. 17979, 7th Cir. 1970). In Ja Kim v. INS, 403 F. 2nd 636 (7th Cir. 1968), the Court held that an administrative appeal stays both the order of deportation and the running of the voluntary departure time. The same result was reached in Chen v. Pilliod, No. 72 C 2754 (E.D. Ill. 1973). There the alien had applied to the District

Director for an extension of voluntary departure eight days before the time granted by the Immigration Judge was due to expire. The District Director denied the application three weeks later and sought to enforce the alien's deportation. The Court held that as a matter of law, due process required that the deportation order be cancelled. The Court reasoned that the alien was entitled to a decision on his timely request for an extension before the sanction of deportation was imposed. Thus, the Court ordered that the alien be given a new opportunity to depart voluntarily.

If the Immigration Judge's order of May 6th is interpreted as setting the time for voluntary departure, then this case is similar to Chen v. Pilliod, supra. Here the Brioneses made a timely request for extension, which, from all we can tell from the record, was not adjudicated until after their time expired. Thereafter, they were summarily ordered deported. As a matter of law, however, the timely submission of their request for an extension tolled the running of the voluntary departure. As in Chen v. Pilliod, supra, due process required that the deportation order be rescinded and that the Brioneses be given time in which to depart voluntarily.

Thus, under either interpretation of the Immigration Judge's order of May 6, 1974, as a matter of law, the Brioneses must be considered as still under the Judge's grant of voluntary departure.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED AND THE MATTER REMANDED TO THE DISTRICT DIRECTOR FOR THE PURPOSE OF ENTERING AN ORDER CANCELLING THE WARRANT OF DEPORTATION AND PERMITTING THE BRIONESES TO DEPART VOLUNTARILY.

Dated: September 14, 1976

Respectively submitted,

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STANLEY H. WALLENSTEIN

-Of Counsel-

A 202 Affidavit of Personal Service of Papers
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC

GASTON BRIONES and CECILIA BRIONES,

Appellants,

- against -

MAURICE F. KILEY,

Appellee.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 15th *day of* Sept. *19*76 *at* 1 St. Andrews Plaza New York, N.Y.

deponent served the annexed *upon* Robert Fiske, Jr., Attention: Special Assistant, Mary P. Maguire

the ~~attorney~~ *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 15th *day of* September *19* 76

Beth A. Hirsh

BETH A. HIRSH
NOTARY PUBLIC, State of New York
No. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Reuben Shearer

Reuben Shearer